

Questions & Answers on Southern Resident Killer Whale Final ESA Listing November 2005

Q. I thought NOAA Fisheries Service already made a determination on the status of Southern Resident killer whales under the Endangered Species Act.

A. We did. In July 2002 NOAA Fisheries Service announced its determination that listing North Pacific Southern Resident killer whales (*Orcinus orca*) as threatened or endangered under the Endangered Species Act (ESA) was [not warranted](#) (PDF 56KB) because Southern Resident killer whales did not constitute a species, subspecies or distinct population segment as defined by the ESA. To find that Southern Residents are a “distinct population segment,” we must conclude they are both “separate” from other killer whale populations and “significant” to their species or subspecies. Scientists have considered killer whales worldwide as belonging to a single species. Although many scientists believe there may be more than one species, there is no agreement in the scientific community as to what those would be. No subspecies have been recognized by the scientific community. Given the uncertainty, NOAA Fisheries Service considered the significance of the Southern Residents with respect to all killer whales worldwide. The agency also announced its intention to reconsider the classification of killer whales within four years, or as new information became available, in recognition of the uncertainties regarding the taxonomic status of killer whales worldwide.

Q. Was NOAA Fisheries Service's ESA “not warranted” finding overturned?

A. NOAA Fisheries Service not warranted finding was challenged in court. The judge issued an order on Dec. 17, 2003, which set aside NOAA’s not warranted finding. It remanded the matter back to the agency for re-determination of whether the Southern Resident killer whales should be listed under the ESA. The court found that it was unreasonable for NOAA Fisheries Service to rely upon the view that there is only one world-wide killer whale species, when NOAA’s scientists said that view was outdated. In light of the court’s order, NOAA Fisheries Service compressed the schedule it had previously announced for reconsidering the status of the Southern Residents.

Q. What did NOAA do to make a new determination?

A. NOAA Fisheries Service reconvened a biological review team and [requested information](#) (PDF 38KB) to assist with an update of the status review. In addition, NOAA Fisheries Service co-sponsored a cetacean taxonomy workshop in 2004, which included a special session on killer whales. The biological review team considered new information available, including cetacean taxonomy workshop papers and reports, and other available published and unpublished information. New information helped the biological review team [evaluate](#) (PDF 2.8MB) whether Southern Residents are a distinct population segment under the ESA.

Q. What is the definition of “species” and distinct population segment under the ESA?

A. The ESA defines a species to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” The U.S. Fish and Wildlife Service and NOAA Fisheries Service adopted a [policy](#) (PDF 28KB) in 1996 to clarify their interpretation of a distinct population segment. The joint policy specifies key elements that must be considered when making a determination, including:

- the discreteness of the population segment in relation to the remainder of the species or subspecies to which it belongs, and
- the significance of the population segment to the species or subspecies to which it belongs.

Correctly identifying the killer whale species or subspecies is important because we evaluate a population’s “significance” relative to the species or subspecies to which it belongs.

Q. Are Southern Resident killer whales a species or distinct population segment?

A. In the [proposal to list](#) Southern Residents under the ESA, NOAA proposed its finding that the Southern Residents are a distinct population segment. The finding was based on the following conclusions by the biological review team:

- There is not enough information to identify more than one world-wide species of killer whale.
- There is sufficient information to conclude that if there are not multiple species there are at least different subspecies.
- There is sufficient information to conclude that North Pacific Resident Killer Whales are likely a subspecies.
- Southern Resident Killer Whales are separate from other North Pacific Residents and are significant to North Pacific Residents.

The proposal and the DPS findings were open for public review and comment.

Q. I thought NOAA Fisheries Service proposed Southern Resident killer whales as “threatened” not “endangered?”

A. We did. In our proposal, we concluded that the Southern Resident killer whale DPS was not “in danger of extinction” (the typical threshold used to define an “endangered” species), citing a variety of factors, including: “the small population increase in the past several years and population increases after previous declines, the presence of reproductive age males in each pod, several juvenile males reaching the age of sexual maturity in the next 2 to 6 years and several juvenile females reaching reproductive age in a few years.” We did conclude, however, that the DPS faced significant risk, based on “the population decline from 1996-2001, the current limited number of reproductive age males, the presence of females of reproductive age that are not having calves, and that the factors for the decline may continue to persist.” We also expressed concern that the small population size, combined with the whales’ socially cohesive nature, makes them susceptible to catastrophic risks, such as oil spills or a disease outbreak.

We received 35 comments from non-governmental organizations, government agencies, concerned citizens and a peer reviewer, and an additional 1,292 form letter e-mails. The majority of comments we received on the proposal to list the Southern Residents as threatened cited the concerns above and others as support for listing the DPS as endangered. We reconsidered the

relative weight we gave the risk factors and the mitigating factors in formulating our proposal, in light of information and analysis received during the comment period, and now find Southern Resident killer whale DPS “in danger of extinction.” In particular, we focused on the pervasive and potentially changing nature of the risk factors, especially disturbance from vessels, the persistence of legacy contaminants and introduction of new toxins to the environment, and the potential limits on prey availability (primarily salmon) given uncertain future ocean conditions.

Q. Does this ESA finding affect the ongoing efforts to develop a conservation plan for Southern Resident killer whales under the Marine Mammal Protection Act (MMPA)?

A. Not really. Now that the Southern Residents are listed under the ESA, NOAA Fisheries Service past conservation planning activity will jointly serve the requirements of the MMPA and the ESA. A conservation plan under the MMPA is patterned after the ESA recovery planning, so our activities to date have dual purpose.

Q. What does this listing mean for Puget Sound?

A. Our [proposed conservation plan](#) identifies the main threats to killer whales in Puget Sound as prey availability, contaminants and pollution, and disturbance by vessels and sound. The conservation plan outlines a number of actions to address these threats, such as supporting salmon restoration efforts in the region, cleaning up contaminated sites, minimizing continuing inputs of contaminants harmful to killer whales, and monitoring emerging contaminants, as well as continuing with evaluation and improvement of guidelines for vessel activity near Southern Resident killer whales and evaluating the need for regulations or protected areas.

Q. Does the ESA provide protection to listed marine mammals beyond those already provided under the MMPA?

A. The MMPA and ESA both have provisions that prohibit “take” of animals in the population. The definitions of “take” for MMPA and ESA are similar. The ESA, however, requires NOAA Fisheries Service to identify “critical habitat.” Under Section 7, any federal agency must consult with NOAA Fisheries Service on any action that may adversely affect a threatened species or its critical habitat. Consultations occur with federal action agencies under Section 7 of the ESA to avoid, minimize or mitigate impacts of their activities on listed species. NOAA Fisheries Service also reviews non-federal activities that may affect species listed under the ESA, and issues permits under Section 10 for incidental take of those species and for scientific research and enhancement purposes.

Q. Are you done with ESA rulemaking for Southern Resident killer whales?

A. No. NOAA Fisheries Service is crafting a critical habitat proposal for the Southern Resident killer whales. In previous *Federal Register* notices, the agency requested public input on this topic. The proposal will be published soon for public comment.